

ORIGINAL

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AUG - 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 6, 1996

OUR FILE NO.
1410-101-63

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

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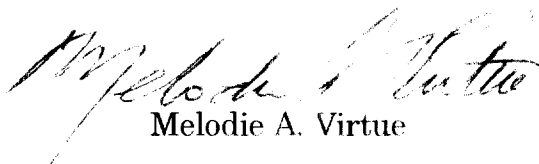
RE: MM Docket No. 96-95
RM-8787, 8838
Papillion and Plattsmouth, NE and
Osceola, IA

Dear Mr. Caton:

Transmitted herewith, on behalf of LifeStyle Communications Corp., are an original and four copies of its **MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS** and **SUPPLEMENTAL COMMENTS** in the above-referenced proceeding.

Should further information be necessary, please communicate directly with this office.

Very truly yours,



Melodie A. Virtue

Enclosures (5)
MAV/blr

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ORIGINAL

Before The
Federal Communications Commission

Washington, D.C. 20554

RECEIVED
- 6 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter Of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations.
(Papillion and Plattsmouth, Nebraska, and
Osceola, Iowa)

MM Docket No. 96-95
RM-8787, 8838

To: Chief, Allocations Branch

**Motion for Leave to File
Supplemental Comments**

LifeStyle Communications Corp. ("LifeStyle"), licensee of KJJC(FM),
Osceola, Iowa, by counsel, hereby respectfully moves for leave to file supplemental comments in opposition to the Reply Comments of Platte Broadcasting, Inc., filed June 29, 1996, and the Supplement to Reply Comments of Platte Broadcasting, Inc. ("Petitioner"), filed July 1, 1996, in the above-captioned rule making proceeding.

In its Reply Comments, Petitioner submitted a late counterproposal to LifeStyle's counterproposal. Although Petitioner touts its Reply Comments as a resolution of this proceeding, instead it is a request to change its community of license which must be subjected to public notice and comment. As it was filed after the deadline for filing comments in the original proceeding for which Public Notice was given, no additional public notice of its counter-counterproposal has been given. Thus, there has been no prescribed opportunity under the rules to comment on its proposal to change community of license. LifeStyle

respectfully requests leave to file its Supplemental Comments in opposition to Petitioner's delayed attempt to do an end-run around the Commission's procedural rules. LifeStyle's concurrently-filed Supplemental Comments will assist the Commission with resolution of this issue and provide the Commission with a better record from which to base its decision in this proceeding.

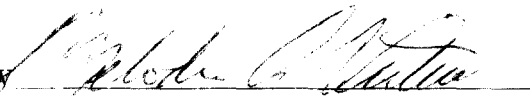
WHEREFORE, the premises considered, LifeStyle Communications Corp. respectfully requests that the Commission grant it leave to file the concurrently-tendered Supplemental Comments and that it accept the Supplemental Comments.

Respectfully submitted,

LIFESTYLE COMMUNICATIONS CORP.

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703/841-0606

August 6, 1996

By 
John M. Pelkey
Melodie A. Virtue
Its Attorneys

Before The
Federal Communications Commission

Washington, D.C. 20554

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In The Matter Of

Amendment of Section 73.202(b)
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(Papillion and Plattsmouth, Nebraska, and
Osceola, Iowa)

MM Docket No. 96-95
RM-8787, 8838

To: Chief, Allocations Branch

Supplemental Comments

LifeStyle Communications Corp. ("LifeStyle"), licensee of KJJC(FM),
Osceola, Iowa, by counsel, hereby respectfully submits its supplemental com-
ments in opposition to the Reply Comments of Platte Broadcasting, Inc., filed
June 29, 1996, and the Supplement to Reply Comments of Platte Broadcasting,
Inc., filed July 1, 1996, in the above-captioned rule making proceeding.

Background

Platte Broadcasting, Inc. (hereinafter "Petitioner"), was the petitioner for
the channel changes proposed in the *Notice of Proposed Rule Making and Order
to Show Cause* (hereinafter "Notice"), DA-96-554, released April 25, 1996. The
Notice proposed to substitute Channel 295C3 for Channel 295A at
Plattsmouth, Nebraska, and Channel 296C2 for Channel 295C2 at Osceola,
Iowa. LifeStyle owns Radio Station KJJC which operates on Channel 295C2 at
Osceola, and which would be forced to change channels if the proposal in the
Notice were adopted. The Notice established June 17, 1996, as the deadline for

comments and counterproposals. In formal comments filed June 12, 1996, Petitioner reiterated its intention to apply for Channel 295C3 at Plattsmouth

On the comment deadline, LifeStyle submitted its Counterproposal and Opposition to the Notice. LifeStyle's counterproposal requested the allotment of Channel 295A to Papillion, Nebraska, as its first local service, and the substitution of Channel 299A for Channel 295A at Plattsmouth, Nebraska, in order to accommodate the new allotment to Papillion. Petitioner currently operates KOTD-FM on Channel 295A at Plattsmouth and would have to change channels to 299A under LifeStyle's counterproposal. LifeStyle expressed its interest in applying for the new channel at Papillion and committed to reimbursement of KOTD-FM's reasonable expenses if LifeStyle obtained the permit for the new allotment at Papillion.

In Reply Comments, long after the deadline for filing counterproposals, Petitioner submitted a counterproposal to LifeStyle's counterproposal. It introduced for the first time a proposal to change its community from Plattsmouth to Papillion, utilizing Channel 295C3 at Papillion instead of its initial proposal to use that channel to upgrade its existing facilities at Plattsmouth. Its counter-counterproposal would continue to require KJJC to change channels. Its counter-counterproposal also proposes the addition of new Channel 299A at Plattsmouth for which it expresses its interest in applying. Petitioner's Reply, p. 5. Petitioner also argued that its counterproposal to LifeStyle's counterproposal precluded any other applications or expressions of interest for the proposed new Papillion allotment because its abandonment of Plattsmouth and move to Papillion would be on a co-channel. Petitioner's Reply, p. 6.

Petitioner's Counterproposal is Late.

Petitioner's so-called resolution amounts to a late-filed counterproposal which must be dismissed. It was wholly within Petitioner's ability to file for Papillion by the comment deadline yet it failed to do so until after LifeStyle filed its counterproposal. The Appendix to the Notice, paragraph 3(a), and Rule 1.420(d) are explicit that "[c]ounterproposals shall be advanced in initial comments only and will not be considered if they are advanced in reply comments." 47 C.F.R. § 1.420(d). While there is no prohibition on a petitioner filing a counterproposal that conflicts with its initial petition, it must do so by the deadline for initial comments. *Amendment of Section 73.202(b) (Canovanas, Culebra, Las Piedras, Puerto Rico, et al.)*, 7 FCC Rcd. 3324, 3327 (MMB 1992). Counterproposals advanced in reply comments, as were Petitioner's, will not be considered. *Amendment of Section 73.202(b) (Woodville and Liberty, Mississippi; Clayton and Jena, Louisiana)*, 11 FCC Rcd. 4712, 4712 n.4 (MMB 1996). Petitioner's proposal to change its community of license comes too late to be considered in the instant rulemaking proceeding.

The Commission must adhere to the proper cut-off rules in its allotment proceedings. "The continuous filing of proposals without regard to a cut-off date is not conducive to the efficient transaction of Commission business and would delay service to the public." *Amendment of Section 73.202(b) (Pinewood, South Carolina)*, 5 FCC Rcd. 7609, 7610 (1990). Petitioner's late counterproposal must be barred until after a decision has been made on the timely-filed counterproposal. *FM Channel Assignments (Atlanta, Blackshear, Georgia, et al.)*, 55 FCC 2d 62, 68 n.10 (1975), *aff'd sub nom. Broadcast Good News! Committee*

v. FCC, 543 F.2d 416 (D.C. Cir. 1976). The Commission has rejected late proposals framed as an "'alteration of an existing plan' the essentials of which are 'identic[al]' to its original proposal and that . . . [are] an 'internal rearrangement and simplification of the matter already under consideration.'" 55 FCC2d at 69. Here, too, Petitioner's so-called resolution must be rejected.

The fact that Petitioner's late counterproposal is a request for a co-channel change in community does not mean that its proposal will be mechanically granted. The Commission must "evaluate all conflicting proposals, regardless of whether they involve a change in community of license, using the same priorities and policies." *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd. 4870, 4873 (1989), *recon. granted*, 5 FCC Rcd. 7094 (1990) (hereinafter *Community of License*). LifeStyle's counterproposal, which was filed before Petitioner's counter-counterproposal, represents a conflicting proposal that has priority in time -- it was timely filed before Petitioner tried to bootstrap itself to LifeStyle's counterproposal. *See Amendment of Section 73.202(b) (Brookville and Punxsatawney, Pennsylvania, et al.)*, 11 FCC Rcd. 2517, 2517 (MMB 1996).¹ If Petitioner's counter-counterproposal had not been late, it would have been entitled to be compared to LifeStyle's earlier-filed counterproposal. Since it was late, it must be rejected without further consideration.

¹ In that case, a petitioner proposed a non-adjacent channel upgrade at Brookville, Pennsylvania, from 240A to 288B1, which required a Punxsatawney, Pennsylvania, station to move from Channel 288A to 281A. The Punxsatawney station countered with a late petition to upgrade its channel and change its community to operate on co-Channel 288B1 at Brookville, claiming exclusive use of the channel pursuant to *Community of License*, similar to Petitioner's argument here. The FCC rejected the Punxsatawney request as late-filed.

The Urbanized Area Policy Applies to a Change of Community.

Contrary to Petitioner's erroneous characterization (Petitioner's Reply, p. 6), Papillion is within the Omaha Urbanized Area, which places a special burden on the proponent of a change in community of license from a more remote community to a suburb of a metropolitan center.² *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7096 (1990). A copy of the U.S. Department of Commerce map of the Omaha Urbanized Area is attached as Exhibit A which shows Papillion to be within and Plattsmouth to be outside the urbanized area. In order to avoid the wholesale migration of rural stations to the larger urban areas, the Commission will not blindly accept claims of first local service. *Id.* See *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *Faye & Richard Tuck*, 3 FCC Rcd. 5374 (1988). Instead, it will compare the proposed move to the suburban community without reference to the first local service allotment priority unless the licensee proposing to abandon the rural community proves that the suburban community is not interdependent on the large metropolitan city central to the urbanized area. Thus, if the Commission does consider Petitioner's late counterproposal, it must evaluate Petitioner's counterproposal to change communities in light of the urbanized area policy.

² Petitioner characterizes Papillion as a "bedroom suburb of Omaha, Nebraska, . . . served by dozens of Class 'C' facilities from the City of Omaha and surrounding areas." Petitioner's Reply p. 4.

It is not clear from Commission precedent, however, that LifeStyle's counterproposal for new local service to Papillion is similarly subject to the Urbanized Area Policy as would be a proposal to change community of license.³ As recently as July 1996, the Commission declined to apply the Urbanized Area Policy to evaluate a singleton AM applicant's claim to first local service. *North Texas Radio, Inc.*, FCC 96-297, released July 11, 1996, slip op. at 6. Unlike Petitioner, LifeStyle has not used the first local service priority as a rationale in the context of moving a station from outside to inside an urbanized area. See *Amendment of Section 73.202(b) (Homestead and North Miami Beach, Florida)*, 10 FCC Rcd. 13149, 13150 (MMB 1995)(first local service not used as a basis to enter a market where move proposed within same urbanized area).

LifeStyle's Counterproposal for New Service should be Preferred.

Petitioner also proposes the allotment of Channel 299A to Plattsmouth to replace the service that would be lost with its change in community. Nonetheless, the Commission knows that the "potential for service at some unspecified future date is a poor substitute." *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7097 (1990). The Commission has recognized the "strong public interest commitment not to disrupt existing service to the listening public, which has a strong expectation that its existing stations will

³ LifeStyle was unable to find a single case citing the Urbanized Area Policy against a proposal for brand new service in an FM allotment rule making proceeding. Absent a proposal to change community or a comparative hearing case, the Commission is reluctant to extend the *Huntington* exception. See *North Texas Radio, Inc.*, FCC 96-297, released July 11, 1996, slip op. at 6-7; *Faye & Richard Tuck, Inc.*, 3 FCC Rcd. 5374-5377 (1988).

continue providing service." *Amendment of Section 73.202(b) (Saltville, Virginia, and Jefferson, North Carolina)*, 11 FCC Rcd. 5234, 5236 (MMB 1996). When the Commission revised its policies regarding changes in community of license, it clarified "that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to 'existing' service occasioned by removal of an operating station." *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7097 (1990).

What Petitioner proposes to the Commission is a game of hide the pea. Its proposed new service for Papillion on Channel 295C3 will be provided from the same site it proposed in its original proposal to use Channel 295C3 to upgrade Plattsmouth. The only difference is the community of license. LifeStyle demonstrated in its counterproposal that the Petitioner, from the same site in its initial proposal, offered a net gain in service of only 136,255, whereas LifeStyle's proposed new allotment to Papillion would net new service to 454,252 more people than Petitioner's initial proposal. All Petitioner offers now in its late counter-counterproposal is to apply for another Class A channel at Plattsmouth to replace the one it is abandoning by changing its community, while, at the same time, attempting to preclude anyone else from applying for the proposed new Papillion channel. LifeStyle, which initially found the available channel for Papillion and proposed it in a timely counterproposal, would be grossly prejudiced if it were precluded from applying for Papillion because of Petitioner's gamesmanship.

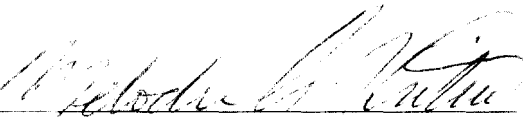
WHEREFORE, the premises considered, LifeStyle Communications Corp. respectfully requests that the Commission reject the proposal set forth in the NPRM and the counter-counterproposal in Petitioner's Reply Comments, and that it accept LifeStyle's Counterproposal to substitute Channel 299A for Channel 295A at Plattsmouth, Nebraska, and to allot Channel 295A at Papillion, Nebraska.

Respectfully submitted,

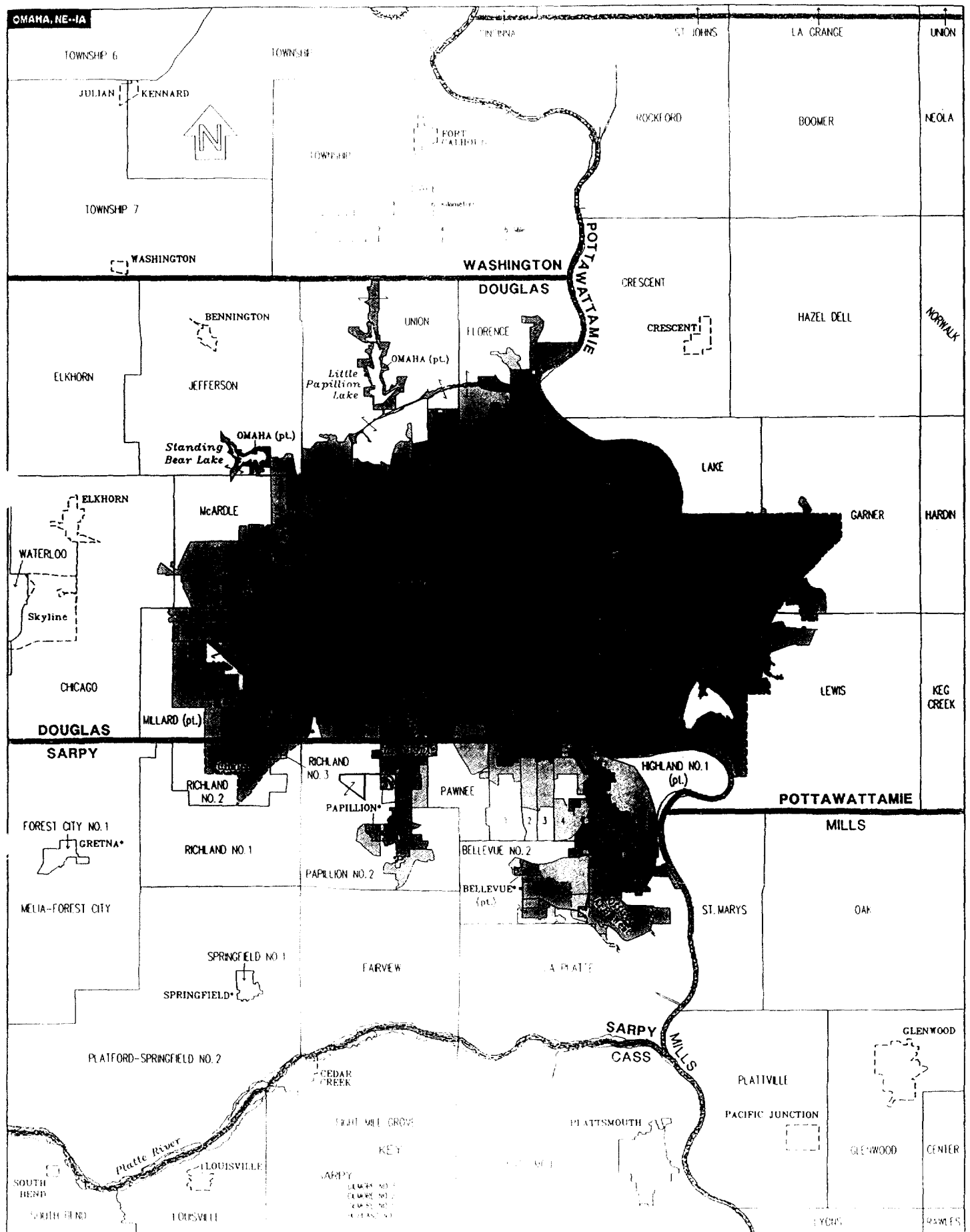
LIFESTYLE COMMUNICATIONS CORP.

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August 6, 1996

By 
John M. Pelkey
Melodie A. Virtue
Its Attorneys

Urbanized Areas



U.S. DEPARTMENT OF COMMERCE Economic and Census Administration Bureau


MAPS

NEBRASKA G-15

CERTIFICATE OF SERVICE

I, Barbara L. Rascon, a secretary in the law offices of Haley Bader & Potts P.L.C., hereby certify that I have on this 6th day of August 1996, sent copies of the foregoing "**MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS**" and "**SUPPLEMENTAL COMMENTS**" by first-class, United States mail, postage prepaid, to the following:

Richard J. Hayes, Jr., Esq.
13809 Black Meadow Road
Greenwood Plantation
Spotsylvania, VA 22553
(Counsel to Petitioner)


Barbara L. Rascon